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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 308

THE UNITED STATES, *Petitioner,*

v.

MEMPHIS COTTON OIL COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE RESPONDENT

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HAYWORTH PRINTING COMPANY . WASHINGTON D C

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statutes and Regulations Involved	3
Statement	3
Summary of Argument	8
Argument—	
I. Respondent's Original Claims for Refund on Form 843, Together with the Detailed Evidence in Support Thereof, Which the Commissioner of Internal Revenue Requested in Order to Decide Upon the Merits of Said Claims, and Which the Respondent Furnished to the Commissioner Pursuant to Such Request, Are Sufficient to Form the Basis of Respondent's Suit to Recover the Admitted Overpayments	9
II. If the Respondent's Claims for Refund on Form 843, Together with Evidence Which the Respondent Furnished to the Commissioner in Support Thereof, Are Inadequate to Form the Basis of This Suit, Said Claims on Form 843, Together with Said Evidence, as Amended by the Respondent on April 2, 1929, Are Adequate to Form the Basis of Such Suit	29
Conclusion	35
Appendix	36

AUTHORITIES CITED

Cases:	Page
Art Metal Const. Co. v. U. S., 47 F. (2d) 558	31, 32
Bonwit Teller & Co. v. U. S., 283 U. S., 258	21, 24
Bugajewitz v. Adams, 228 U. S., 585	17
Connell v. Hopkins, 43 F. (2d) 773	32
Electric Power & Light Corp. v. U. S., — Ct. Cl. —	26, 27
Feather River Lumber Co. v. U. S., 66 Ct. Cl. 64	13
Johnson v. U. S., 225 U. S., 405	17
Johnson v. U. S., — Ct. Cl. —	26
Lehigh & Wilkes Barre Coal Co. v. U. S., 38 F. (2d) 637	32
McKesson & Robbins v. Edwards, 57 F. (2d) 147	30, 32
Mutual Life, etc., Co. v. U. S., 49 F. (2d) 662	32

Page

Nichols v. U. S., 7 Wall. 130 20
Paul Jones & Co. v. Lucas, 33 F. (2d) 907 13
Solomon v. U. S., 57 F. (2d) 150 32
Sugar Land Ry. Co. v. U. S., 48 F. (2d) 973 32
Swift & Co. v. U. S., 67 Ct. Cl. 322 35
Tucker v. Alexander, 275 U. S. 228 ..... 18, 24
Tucker v. Alexander, 15 F. (2d) 356 13
Union & N. H. Tr. Co. v. Eaton, 20 F. (2d) 419 13
Union Tr. Co. v. McCaughn, 24 F. (2d) 459 ..... 13, 25
United States ex rel. Endicott v. Mellon, 59 App. D. C. 255 ..... 31, 34
United States v. Felt & Tarrant Mfg. Co., 283 U. S. 269 ..... 19, 31
Warner v. Walsh, 24 F. (2d) 449 13
Wausau, etc., Co. v. U. S., 49 F. (2d) 662 32
Wunderle v. McCaughn, 38 F. (2d) 258 13
Zeller v. U. S., 46 F. (2d) 1023 34

Regulations:

Regulations 45, Art. 1036 15
Regulations 62, Art. 1036 ..... 14, 15, 17, 38
Regulations 65, Art. 1036 15
Regulations 69, Art. 1304 15
Regulations 74, Art. 1254 15
Treasury Decision 4265 ..... 16, 17, 39

Statutes:

Act of Feb. 13, 1925, Sec. 3 (b) 2
Revenue Act of 1926—
Sec. 284 (a), (b) 11, 12, 36
Revised Statutes, Sec. 3226 ..... 11, 12, 13, 14, 26, 37

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OPINION BELOW

The opinion of the Court of Claims (R. 38) is reported in 59 F. (2d) 276.

JURISDICTION

The judgment of the court below was entered May 31, 1932. (R. 33.) Petition for a writ of certiorari was filed August 19, 1932, and the writ was granted October 17, 1932. (R. 41.) The juris-

diction of this Court rests upon Section 3 (b) of the Act of February 13, 1925.

Question Presented

There are two questions presented:

I.

Whether the respondent may maintain this suit for refund of 1922 and 1923 income taxes on claims for refund filed on official Form 843, which claims set forth without detailed evidence the amount of net income for one year and the amount of net loss for the other year, per respondent's books; where the respondent, after filing said claims, furnished such detailed evidence to the Commissioner of Internal Revenue through his internal revenue agent, whom the Commissioner had instructed to audit the respondent's books and records for the years 1922 and 1923, *in order that the Commissioner might decide upon the merits of said claims for refund;* where the Commissioner considered such detailed evidence in connection with the respondent's said claims for refund and found that the respondent's income taxes for the years 1922 and 1923 were overpaid in the amounts for which this suit is brought, and where the Commissioner subsequently refused to allow said claims for refund for the sole alleged reason that no evidence was filed with said claims to support the same.

II.

If the original claims for refund filed on official Form 843, together with the detailed evidence to

support the same, which the respondent furnished to the Commissioner of Internal Revenue under the circumstances set forth in I, *supra*, are inadequate to form the basis of this suit, whether such original claims for refund on Form 843 could be amended before the rejection thereof, and after the expiration of the statute of limitations for the filing of new claims for refund for said years 1922 and 1923.

Statutes and Regulations Involved

The applicable provisions of the statutes and regulations involved are set forth in the Appendix. (Infra, p. 36.)

STATEMENT

The respondent sued in the Court of Claims to recover overpayment of income taxes for the years 1922 and 1923, and that court gave judgment for respondent. (R. 40.) The following is a summary of the findings of fact made by that court. (R. 33-38.)

The respondent duly made and filed its income tax returns for 1922 and 1923 and duly paid its taxes for said year, paying installments as follows: *for 1922,* $6,250, $6,563.12, $6,406.57, and $6,406.56, on March 11, June 14, September 13, and December 7, 1923, respectively; *for 1923,* $1,393.94, $1,393.98, $1,395.48, and $1,395.49, on March 7, June 12, September 12, and December 6, 1924, respectively. The respondent's income taxes were overpaid $1,660.70 for 1922 and $4,835.76 for 1923. (R. 33, 34.)

On June 30, 1927, respondent filed a timely claim for refund for 1922 under oath on Form 843, prescribed by the Bureau of Internal Revenue, claiming a refund of $1,329.69, or such greater amount as should be legally refundable. In addition to the formal information required, said claim contained the following statement:

"Deponent verily believes that this application should be allowed for the following reasons:

The statement attached hereto shows—

1. That the amount of tax paid for this year was	$25,626.25
2. And that the correct amount of tax due was	24,296.56
3. And there was overpaid in error	$1,329.69
4. Refund of which is requested and with interest as provided by law	
Net income per books	$159,836.71
Taxable net income	194,372.46
Difference	$34,535.75

Viz.: Income taxes, $34,535.75

COMPUTATION OF TAX

Net income	$194,372.46
12½ per cent	24,296.56
Previously paid	25,626.25
Overpaid	$1,329.69"

(R. 15, 16, 34.)

On June 30, 1927, respondent filed a timely claim for refund under oath for 1923 on Form 843, prescribed by the Bureau of Internal Revenue, claiming a refund of $1,813.39, or such greater amount as should be legally refundable. In addition to the formal information required, said claim contained the following statement:

"Deponent verily believes that this application should be allowed for the following reasons:

The statement attached hereto shows:

1. The tax paid is	$5,578.85
2. The correct tax due, as	3,765.46

3. Tax overpaid in error	$1,813.39
4. Refund of which is requested and with interest as provided by law.	
Net loss per books	$3,781.01
Taxable net income	30,123.71
Difference	$33,904.72

Viz.: Income taxes, $33,904.72

COMPUTATION OF TAX

Net income	$30,123.71
Tax 12½ per cent	3,765.46
Tax paid	5,578.85
Overpaid	$1,813.39"

(R. 17, 18, 34, 35.)

Upon receipt of these claims for refund, the Commissioner of Internal Revenue, *in order to decide upon the merits thereof,* instructed an internal revenue agent to investigate and audit the respondent's books and records; the respondent furnished the necessary evidence to said internal revenue agent, who made a full and detailed report to the Commissioner of Internal Revenue on February 7, 1928, a copy of which was furnished to the respondent on April 12, 1928. Said report showed the net income as disclosed by the respondent's books, the correct statutory net income for each of said years, with the adjustments, nature, and the amounts of the various items going to make up the difference, with a detailed explanation of each item. It also showed that the respondent was overassessed $1,660.70 for 1922 and $4,835.76 for 1923. (R. 19-23, 35.)

Subsequent to the investigation and audit of the respondent's books and records by the revenue agent pursuant to the instructions of the Commissioner, to wit, on August 9, 1928, the Deputy Com-

missioner of Internal Revenue in charge of the Income Tax Unit, advised the respondent by letter that the revenue agent's report had been reviewed and that respondent was overassessed in the amounts of $1,660.70 for 1922, and $4,835.76 for 1923. The Deputy Commissioner incorporated into his letter of August 9, 1928, the details which were contained in the revenue agent's report of February 7, 1928; and the Deputy Commissioner's said letter contained the following statement:

> "Your claims for refund of $6,148.61, $1,329.68, and $1,813.39 for the years 1921, 1922, and 1923, respectively, *have been given careful consideration and adjusted in accordance with the above statements.*" (Italics ours.) (R. 23-27, 35, 36.)

On September 7, 1928, the respondent protested the amount of depreciation allowed by said Deputy Commissioner in his letter of August 9, 1928; and on October 13, 1928, said Deputy Commissioner mailed a letter to the respondent in which he denied the respondent's protest with respect to depreciation. Said Deputy Commissioner's letter of October 13, 1928, contained statements and schedules showing the details of determination with respect to the taxes for 1922 and 1923, disclosed the same overassessments for each of said years that were set forth in the revenue agent's report and said Deputy Commissioner's letter of August 9, 1928. The respondent was again advised that its claims for refund had been carefully considered and adjusted in accordance with the statement made in said letter of October 13, 1928. (R. 27-31, 36.)

Thereafter on January 26, 1929, said Deputy Commissioner advised the respondent that its claims for refund would be rejected inasmuch as no evidence had been filed with the claims to support respondent's contentions. (R. 31, 36, 37.)

The Deputy Commissioner referred to herein acted with the same power and authority in making the findings and decisions set forth in his letters of August 9, 1928, October 13, 1928, and January 26, 1929, as the Commissioner of Internal Revenue had personally to make such findings and decisions. (R. 38.)

On April 2, 1929, the respondent, by its attorney, addressed a letter to the Commissioner of Internal Revenue amending respondent's claims for refund for 1922 and 1923, by specifically claiming the overassessments of $1,660.70 for 1922, and $4,835.76 for 1923, and attaching to said amendment, which was made a part thereof, a copy of said Deputy Commissioner's said letter of October 13, 1928, which counsel for petitioner on page 1 of his brief admits would have been adequate for the allowance of the claims for refund, if the same information had been presented with said claims when filed. (R. 32.)

On October 23, 1929, the respondent's said claims for refund for 1922 and 1923 were rejected by the Commissioner.

SUMMARY OF ARGUMENT

The respondent's claims for refund on Form 843, setting forth net income per books for one year and net loss per books for the other, together with the detailed evidence in support thereof, which the respondent furnished to the Commissioner at the latter's request, *in order for the Commissioner to decide upon the merits of said claims,* are adequate to form the basis of this suit. The Commissioner considered said evidence in connection with said claims and found that the respondent's taxes were overpaid in the amounts for which this suit is brought.

The petitioner admits that the claims would have been sufficient if the evidence presented to the Commissioner after the filing of the claims had been submitted *in the claims themselves.* Neither the statute nor the regulations require that this be done. All that is necessary is that the taxpayer support its claim by sufficient evidence in order that the Commissioner may pass upon the issues involved before suit is brought. Not only was this done here, but the Commissioner actually considered the evidence and held that it was sufficient to support the claims. Having all of the facts before him, and not being mislead in any respect whatsoever, the Commissioner should not be sustained on the mere technicality that the evidence was not presented in the claims themselves.

If the claims on Form 843 as filed, together with the evidence presented by the respondent to the Commissioner in support thereof, are not sufficient

upon which to base this suit, the amendment of the respondent's claims made on April 2, 1929, perfected any defect that may have existed prior to such amendment. This amendment was made after the expiration of the statute of limitations for filing claims, but before the rejection of respondent's claims on Form 843.

ARGUMENT

I.

Respondent's Original Claims for Refund on Form 843, Together with the Detailed Evidence in Support Thereof, Which the Commissioner of Internal Revenue Requested in Order to Decide Upon the Merits of Said Claims, and Which the Respondent Furnished to the Commissioner Pursuant to Such Request, Are Sufficient to Form the Basis of Respondent's Suit to Recover the Admitted Overpayments.

It is admitted by the respondent that its claims for refund on Form 843, were insufficient *per se,* without the filing of additional evidence in support thereof; and it is conceded by the petitioner that the respondent furnished evidence to the Commissioner prior to the rejection of said claims, which would have been sufficient to allow them, if such evidence had been presented in the claims themselves. (Petitioner's brief, p. 1.)

The Commissioner upon receipt of these claims sent a revenue agent to respondent's place of business to audit its books and records *"in order to*

decide upon the merits thereof." (R. 35.) The respondent opened its books and records to the revenue agent for the purpose of giving the Commissioner the detailed evidence requested in order to pass upon its claims for refund, and said revenue agent made a report to the Commissioner on February 7, 1928. The Commissioner considered the claims and found that the information furnished by the respondent supported the same, which is evidenced by the Commissioner's letters to the respondent under date of August 9, 1928, and October 13, 1928. These letters set forth all of the details of respondent's income and deductions necessary to pass upon the claims, and further stated that the respondent's claims for refund "have been given careful consideration," and that its income taxes were overassessed in the amounts for which this suit is brought. (R. 23-31.) This is the basis for petitioner's admission that the information furnished by the respondent to the Commissioner "if presented in the claims would have been an adequate basis for allowing a refund." (Petitioner's brief, p. 1.)

The gravamen of petitioner's argument is that the respondent's claims for refund are insufficient to support a suit in court, because the respondent did not present *in its claims for refund* the identical evidence which the Commissioner requested "in order to pass upon the merits thereof," and which the respondent furnished to the Commissioner for that purpose.

This reduces the issue to its simplest terms; and, this Court is called upon to decide whether a tax-

payer is precluded from suing in court for an admitted overpayment of income taxes, solely because the taxpayer failed to present in its claims at the time of filing the necessary evidence to support the same, when as a matter of fact such evidence was submitted to the Commissioner at his request, prior to final action on said claims, and considered by the Commissioner and found by him to be adequate for the purpose of allowing the same.

Whether respondent may maintain this suit depends upon the proper construction of Sec. 284 (a) and (b) of the Revenue Act of 1926, and Sec. 3226, R. S., which are set out in full in the Appendix. (P. 36, *infra.*) For the convenience of the Court, we print excerpts thereof as follows:

> Sec. 284 (a). Where there has been an overpayment of any income, war-profits or excess-profits tax imposed by this Act * * * the Revenue Act of 1921 * * * or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits or excess-profits tax or installment thereof then due from the taxpayer and any balance of such excess shall be refunded immediately to the taxpayer.
>
> Sec. 284 (b). Except as provided in subdivisions (c), (d), (e) and (g) of this section—
>
> (1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim is filed therefor by the taxpayer;

> Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. * * *

Sec. 284 (a) requires the Commissioner to refund or credit, as the case may be, any overpayment of income taxes made by a taxpayer; and Sec. 284 (b) provides that the Commissioner shall not make such refund or credit after four years from the time the tax was paid for 1922 and 1923, unless a claim therefor was filed by the taxpayer prior to the expiration of such period.[1]

The purport of Sec. 284 (a) and (b), therefore, is to make it mandatory upon the Commissioner to refund or credit, in the event of an overpayment, irrespective of whether a claim for refund is filed, except the Commissioner is denied the power to make such refund or credit after four years from the time the tax was paid, unless within such period a claim for refund was filed.

On the other hand, Sec. 3226, R. S., is mandatory that no suit for the recovery of any internal rev-

[1] There are other exceptions in Sec. 284 (c), (d), (e), and (g) of the Revenue Act of 1926, which, however, do not apply to the instant case.

enue tax shall be maintained unless a claim for refund has been filed with the Commissioner of Internal Revenue, irrespective of when such suit is instituted.[2]

The evident purpose of Sec. 3226, R. S., is to require taxpayers first to present their claims to the Commissioner of Internal Revenue before bringing an action in court, in order to give him an opportunity to pass upon the merits thereof. It is founded upon principles of public policy that litigation should be discouraged, and that the courts should not be called upon to decide questions which, if presented to the proper administrative officers, might be settled without resort to litigation.

This principle has been enunciated by the courts in a number of cases. In *Paul Jones & Co. v. Lucas,* 33 F. (2d) 907, the Court said:

> "The evident purpose of Sec. 3226, R. S., is to afford to the Commissioner of Internal Revenue an opportunity to correct any errors made in the assessment or collection of taxes before the taxpayer and the government, or its representatives are put to the expense and trouble of litigation."

To the same effect see *Feather River Lumber Co. v. U. S.,* 66 Ct. Cl. 64; *Tucker v. Alexander,* 15 F. (2d) 356; *Union & N. H. Tr. Co. v. Eaton,* 20 F. (2d) 419; *Warner v. Walsh,* 24 F. (2d) 449; *Union Tr. Co. v. McCaughn,* 24 F. (2d) 459; *Wunderle v. McCaughn,* 38 F. (2d) 258.

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[2] There are other provisions of Sec. 3226, R. S., limiting the time within which suit may be filed, even though a claim for refund was duly filed, but these provisions are not pertinent here.

In the instant case the Forms 843, together with the detailed evidence which the respondent submitted in support thereof to the Commissioner of Internal Revenue, through his internal revenue agent, in order for the Commissioner to pass upon the merits of said claims, not only were in sufficient detail to acquaint the Commissioner with the issues involved, but the Commissioner actually considered such evidence in connection with said claims and advised respondent that on the basis of such evidence its taxes for 1922 and 1923 were overstated in the amounts for which this suit is brought.

The claims on Form 843 and the evidence in support thereof, which the respondent submitted to the Commissioner of Internal Revenue, clearly satisfy Sec. 3226, R. S., in so far as the purpose of that section is concerned, in requiring the taxpayer to submit his contentions to the Commissioner of Internal Revenue as a condition precedent to suit.

Art. 1036 of Reg. 62, promulgated under the Revenue Act of 1921, is relied upon by petitioner in support of his argument that respondent's claims for refund are inadequate upon which to base this suit.[3] This article is quoted in full in the Appendix (P. 36, *infra*); but we quote below the portion thereof upon which the petitioner relies.

> "Art. 1036. *Claims for refund of taxes erroneously collected.*—Claims by the taxpayer

[3] This regulation is not referred to specifically in petitioner's brief herein, but petitioner refers to its brief in *U. S. v. Factors & Finance Co.*, No. 141, wherein this regulation is relied upon. Furthermore, the Commissioner rejected respondent's claims for refund for alleged noncompliance with this regulation. (Petitioner's brief, p. 6; R. 31.)

for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. * * *"

The foregoing regulation was promulgated on Feb. 15, 1922. It is substantially the same as corresponding regulations promulgated under the Revenue Acts of 1918, 1924, 1926 and 1928, which are printed in the margin.[4] None of these regulations, including Art. 1036 of Reg. 62, *supra*, specifically provided that the evidence relied upon

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[4] *Art. 1036, Reg. 45*, promulgated April 16, 1919, and repromulgated January 28, 1921, under the authority of the Revenue Act of 1918, provided:

"Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on form 46 (revised). In this case, as in that of claims for abatement, the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. * * *"

Art. 1036, Reg. 65, promulgated October 6, 1924, under the authority of the Revenue Act of 1924, provided:

"Claims by the taxpayer for the refunding of taxes, interest, penalties and additions to tax erroneously or illegally collected shall be made on Form 843. All facts relied upon in support of the claim should be clearly set forth under oath. * * *"

Art. 1304, Reg. 69, promulgated August 28, 1926, under the authority of the Revenue Act of 1926, provided:

"Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843. All facts relied upon in support of the claim should be clearly set forth in detail under oath. * * *"

Art. 1254, Reg. 74, promulgated February 15, 1929, under the authority of the Revenue Act of 1928, provided:

"Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843. A separate claim on such form shall be made for each taxable year or period. All facts relied upon in support of the claims should be clearly set forth in detail under oath. * * *"

should be presented in the claim for refund itself, as the petitioner now contends, and the inference is that such requirement was not intended. This construction of the Commissioner's regulations over the ten-year period from 1919 to 1929 is supported by the fact that on March 27, 1929, the Commissioner promulgated T. D. 4265, *to take effect on May 1, 1929,* which we have printed in full in the Appendix. (P. 36, *infra.*) This T. D. provides that "a claim for refund * * * should be made on * * * Form 843, * * * although a claim will not be considered defective solely by reason of the fact that it is not made" on that form. With respect to the grounds for the claim and the facts in support thereof, however, the T. D. is mandatory. It provides—

> "The claim *must set forth* in detail under oath each ground upon which a refund or credit is claimed and the facts sufficient to apprise the Commissioner of the exact basis thereof. A claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.
>
> "No refund or credit will be allowed after the expiration of the statutory period of limitations applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim, or an amendment thereof, filed prior to the expiration of such period.
>
> "These regulations *shall take effect on May 1, 1929,* and shall be applicable to all claims filed *on or after such date,* and all other regulations are modified in so far as they are inconsistent with these regulations." (Italics ours.)

If Art. 1036 of Reg. 62 made it mandatory on the taxpayer to present in the claim all of the facts in support thereof, as the petitioner now contends, what was the necessity of promulgating T. D. 4265? This T. D. specifically provides that which the petitioner now contends was required by Art. 1036, *supra.* A change in language of an Act evidences a change in the intent of the Legislature, and this applies equally to regulations. (*Johnson v. U. S.,* 225 U. S. 405, 415, 416; *Bugajewitz v. Adams,* 228 U. S. 585, 591.)

That a new requirement with respect to claims for refund was intended is further evidenced by the last paragraph of T. D. 4265, *supra,* to the effect *that it should not take effect until May 1, 1929,* more than thirty days after its promulgation, and that it should apply to all claims *filed on or after such date.* The evident purpose of delaying the effective date was to permit taxpayers to become acquainted with the changed requirements; and the plain purpose of excluding claims for refund filed before May 1, 1929, was to give it only a *prospective* application.

In view of the foregoing, we respectfully submit that Art. 1036, Reg. 62, does not require the evidence in support of a claim for refund to be presented in the claim itself. If the regulation, however, is susceptible of the construction contended for by the petitioner, it is unreasonable in so far as it applies to the instant case, in that it imposes an unnecessary and useless requirement upon the respondent. The reference in the claims to the petitioner's net income and net loss per books for

the respective years, together with the respondent's furnishing the necessary evidence to the Commissioner in support thereof *in order that the Commissioner might decide upon the merits of said claims* was in effect equivalent to presenting such evidence in the claims themselves. The Commissioner was not misled by the claims for refund as filed; he audited the respondent's books *in order to pass upon the respondent's said claims for refund;* the respondent furnished the evidence for the purpose required by the Commissioner; the latter considered the evidence submitted in support thereof and actually determined overassessments in the exact amounts for which this suit is brought. Clearly the Commissioner would have been in no better position to pass upon the merits of respondent's claims, if the evidence in support thereof had been presented in the claims themselves than he actually was under the circumstances of this case, where the identical evidence was furnished to him subsequent to the filing of said claims, *in order that he might decide upon the merits thereof.* To permit the Commissioner to reject the respondent's claims for refund under such circumstances would be to sustain the petitioner on the most flagrant technicality. It would be subversive of instead of conformable to the manifest intent of the statute. (*Lex nil frustra jubet.*)

The language of this Court in *Tucker v. Alexander,* 275 U. S. 228, is applicable here:

> "The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for convenience of government officials in passing

upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery."

The petitioner relies principally upon the decision of this Court in *U. S. v. Felt & Tarrant Mfg. Co.*, 283 U. S. 269, to support its contention that respondent's claims are inadequate upon which to base this suit. In that case the taxpayer filed a general claim for refund stating that it had filed with the Commissioner a claim for special relief under Sec. 210 of the Revenue Act of 1917, and the claim also contained a statement that it was filed "to protect all possible legal rights of the taxpayer, pending, and at the rate of, the settlement of the claim for relief." The claim also requested an oral hearing and the right of appeal in the event of an adverse decision on the part of the Unit and before any rejection of the claim was made. Thereafter the taxpayer filed a brief and made an oral argument in the office of the Commissioner with respect *solely* to the claim for relief under Sec. 210.

The taxpayer's claim for refund based on special relief was allowed in part. Thereafter suit was brought in the Court of Claims for a refund based upon alleged *exhaustion or obsolescence of the taxpayer's patents,* which issue had not been raised in the taxpayer's claim for refund, in its brief, or at the oral hearing on special relief.

Under these circumstances this Court held that the taxpayer could not maintain the suit. We quote from the opinion as follows:

"The filing of a claim or demand as a prerequisite to a suit to recover taxes paid is a

familiar provision of the revenue laws, compliance with which may be insisted upon by the defendant, whether the collector or the United States. * * *

"One object of such requirements is to advise the appropriate officials of the demands or claims intended to be asserted, so as to insure an orderly administration of the revenue (*Nichols v. United States, supra,* 7 Wall. 130, 19 L. ed. 128), a purpose not accomplished with respect to the present demand by the bare declaration in respondent's claim that it was filed 'to protect all possible legal rights of the taxpayer.' The claim for refund, which Sec. 1318 makes prerequisite to suit, obviously relates to the claim which may be asserted by the suit. Hence, quite apart from the provisions of the regulation, the statute is not satisfied by the filing of a paper which gives no notice of the amount or nature of the claim for which the suit is brought, and refers to no facts upon which it may be founded."

Clearly this decision is not authority for the proposition advanced by the petitioner that respondent may not maintain this suit. In the *Felt & Tarrant* case, the right to sue was denied because the taxpayer had not presented to the Commissioner the issue upon which the suit was based. In the instant case, the respondent not only presented to the Commissioner the necessary evidence in support of its claims for refund *in order for the Commissioner to decide upon the merits thereof;* but the Commissioner considered such evidence in connection with such claims and actually found from such evidence that the respondent overpaid

its taxes for 1922 and 1923 in the exact amounts for which this suit is brought. Instead of supporting the contention of the petitioner, that case sustains the right of the respondent to maintain this suit.

In *Bonwit Teller & Co. v. U. S.*, 283 U. S. 258, the facts were as follows:

The Commissioner made a jeopardy assessment; the taxpayer filed a claim in abatement; subsequently on November 19, 1924, the Commissioner mailed the taxpayer a letter disclosing an overassessment of $10,866.43 in excess of the jeopardy assessment, such excess amount representing a part of the original tax paid on December 3, 1919. The Commissioner advised the taxpayer that the overpayment of $10,866.43 could not be refunded because a refund claim was not filed within the statutory period.

Subsequently Congress amended the law extending the time for filing claims for refund for 1919 provided a waiver were filed on or before June 15, 1925. Thereupon the Commissioner wrote the taxpayer advising it to file a waiver, which was done on May 22, 1925, and forwarded to the Commissioner in a letter stating "In accordance with your request we enclose you herewith waiver." This waiver was received and accepted by the Commissioner on May 23, 1925.

The Commissioner decided that the taxpayer's letter of May 22, 1925, enclosing the waiver should be treated as an informal claim for refund filed May 23, 1925.

On December 11, 1926, the taxpayer wrote the Commissioner a letter calling attention to previous

correspondence and informing the Commissioner that the refund had not yet been received. On February 9, 1927, after the expiration of the statutory period, the Commissioner wrote the taxpayer enclosing Form 843 and suggesting that a formal claim be made thereon setting forth the basis for the adjustment. The taxpayer executed Form 843 and stated that the refund should be allowed for the reasons given in the Commissioner's letter of November 19, 1924, a copy of which was attached to the form. This claim was forwarded to the Commissioner on February 17, 1927, received by the Commissioner on February 19, 1927, and allowed by the Commissioner on March 8, 1927, by approving and scheduling to the Collector a certificate of overassessment for $10,866.43.

The Collector credited $9,846.06 of this overpayment for the fiscal year 1919 against an additional assessment for the fiscal year 1917, which additional assessment at the time was barred by the statute of limitations. The Collector sent the taxpayer a check for the balance of $1,462.99, which the latter refused to accept.

The taxpayer sued to recover the overpayment of $10,866.43 for the fiscal year 1919 as determined by the Commissioner and shown in the certificate of overassessment issued by him. In defense, the government contended that the Commissioner's action in allowing the certificate of overassessment was illegal, because the taxpayer had not filed a claim for refund therefor within the statutory period. This Court held that the taxpayer could recover. While the point was made that the case

did not involve the question of the review of the Commissioner's action in rejecting a claim for refund, the language of the court is very broad and clearly applies to a case such as the instant one.

We quote from the opinion as follows:

> "Plaintiff filed its waiver within time and, in consideration of that, it admittedly secured the right to claim the refund. But it did not within the specified time formally make a claim for it. *The government's point comes down to the question whether the waiver and the letter transmitting it together with what went before amounted to the filing of a claim within the meaning of the statute.* (Italics ours.)
>
> "The Commissioner prior to that amendment had finally determined that in 1919 plaintiff had overpaid its tax by $10,866.43. That finding was made upon a consideration of the plaintiff's tax return, its claim for abatement of the jeopardy assessment and presumably all material details of its business in the taxable year. The schedule contained in the audit letter of November 19, 1924, showed the manner in which the bureau had computed the tax. And the refund of the ascertained overpayment was withheld by the Commissioner solely because of plaintiff's lack of compliance with Sec. 281 as it then stood.
>
> "The letter of May 16, 1925, sent soon after Sec. 281 was amended, unmistakably referred to the overpayment that the Commissioner had found and reported. That an allowance of credit or refund was immediately intended is shown by the statement that it could not then be allowed unless waiver was filed as provided by the 1925 amendment. Plaintiff's prompt

execution and return of the waiver and the bureau's acceptance of it clearly show that both considered the facts already found and reported a sufficient basis for plaintiff's claim. That such was the view of the Commissioner is fully confirmed by the notations made on the letter transmitting the waiver and upon the office record of the certificate.

"The question here is to be distinguished from that which would have arisen if, contrary to the taxpayer's insistence, the Commissioner had held that what was done did not constitute a filing of a claim. No statute provides for review of the Commissioner's determinations in favor of taxpayers when made within the scope of his authority. Such rulings are entitled to much weight. In this case he had already found that in 1919 plaintiff had overpaid its tax in the amount stated. He needed no additional information to enable him to determine whether credit or refund should then be made. There is no suggestion that the allowance was induced by or resulted from fraud or mistake. The facts found disclose that there was a reasonable or substantial compliance with the amendment. The Commissioner within the time allowed was advised of the grounds on which plaintiff's right to refund rested and was not misled or deceived by plaintiff's failure to file formal claim and was fully warranted in holding that the waiver and earlier documents were sufficient. *Tucker v. Alexander,* 275 U. S. 228, 231, 72 L. Ed. 253, 256, 48 S. Ct. 45."

We submit that the facts in the instant suit make a stronger case for the respondent than the facts in the *Bonwit Teller & Co.* case did for that tax-

payer. Here an official Form 843 was filed showing net income and net loss per books of the respective years; the Commissioner audited the taxpayer's books *in order to decide upon the merits of the respondent's claim for refund;* the taxpayer furnished such information to the Commissioner for that specific purpose; the Commissioner considered the evidence submitted in connection with the claims and found that the respondent's taxes were overpaid in the amounts for which this suit is brought, advising the respondent to that effect in two different letters in which he set out all the evidence on which his computations were made. There no formal claim on 843 was filed until long after the expiration of the statutory period; but the Commissioner's letter advising of an overassessment, the taxpayer's return, its claim in abatement, the filing of a waiver, and the general intent of the Commissioner and the taxpayer were held to be sufficient to form the basis of a claim for refund.

This Court has not passed upon the question of whether a suit may be maintained to recover taxes erroneously collected and paid where the evidence in support of the claim for refund is not presented in the claim itself but is presented to the Commissioner after the claim is filed and considered sufficient by him for the purpose of allowing the same,—except for the fact that such evidence was not presented in the claim itself.

In addition to being considered by the court below in the instant case (R. 38), the question was passed upon in *Union Trust Co. v. McCaughn,* 24

F. (2d) 459. In the latter case suit was brought on the issue that the Commissioner erroneously included the proceeds of certain life insurance policies in the gross estate. This ground was not presented in the claim for refund itself, but the Commissioner's rejection letter showed that it was presented in a brief filed with the Commissioner and that the question had been considered by him. The court held that the suit was maintainable, on the theory that the purpose of Sec. 3226 R. S., is to afford the Commissioner an opportunity to correct the errors made by his office and to spare the parties and the courts the burden of litigation in respect thereto. We quote in part from the opinion as follows:

> "If these objects have been attained, the statute has been sufficiently complied with, even though some of the grounds upon which the claim was made were not specifically set forth in the application. It is apparent from the letter of the Commissioner that he had before him the question now raised, and that he had full opportunity to reconsider and modify the ruling of his office, had he deemed the ruling erroneous. He also, of course, had the right to waive any defect or informality in the application for refund, and, in view of his letter, he will be held to have done so. I am therefore of the opinion that, so far as this requirement of the statute is concerned, the statement sets out a sufficient cause of action."

The petitioner contends that the Court of Claims in two recent decisions—*Electric Power & Light Corp. v. U. S.;* and *Johnson v. U. S.,* decided on

November 14, 1932, and printed in the Appendix, pp. 23-50 of the petitioner's brief in the case of *Factors & Finance Co. v. U. S.,* No. 141, qualified the scope of the opinion in the instant case. Irrespective of whether this contention is correct, and without discussing the merits of either of these cases, we desire to point out specifically to this Court that the Court of Claims did not in any degree qualify its opinion in so far as it applies to the facts in the instant case. As a matter of fact that Court emphasized the basis for the decision in the instant case below. We quote a portion of the opinion of the court in *Electric Power & Light Corp. v. U. S., supra,* as follows:

> "Plaintiff cites the decision of this court in *Memphis Cotton Oil Co. v. United States,* No. L-173 decided May 31, 1932, to support its contention that the claims filed in this case were sufficient. That case is not in point. There the taxpayer filed a claim setting forth the income which had been returned, and upon which the tax had been paid, the claimed correct net income or loss as per its books for the years involved, and claimed the refund of the resulting overpayments. Upon receipt of these claims the commissioner *for the purpose of deciding upon the merits thereof,* instructed his agent to make an investigation and obtain the facts with reference thereto from the taxpayer by an audit and examination of its books and records. This the agent did, and the taxpayer furnished him with information as to the nature of each item and all the facts in reference to the matter, and the agent thereupon made a detailed report of the facts and the nature of the various items to the commissioner, show-

ing overpayments for the years involved, together with an explanation of the nature of each item as furnished by the taxpayer. These overpayments were somewhat in excess of the amounts claimed in the refund claims theretofore filed. The commissioner found the overpayments to be as stated in the agent's report. These detailed facts and the nature of each item were furnished to the commissioner by the taxpayer through the commissioner's agent before the commissioner had taken any action upon the claims. In these circumstances the court held that the statements of the taxpayer in the claims filed, taken in connection with the facts and reasons furnished to the commissioner by the taxpayer through the commissioner's agent, were sufficient to form the basis of plaintiff's suit to recover the admitted overpayments. Had the commissioner not called for a statement of the nature of the claim and the facts with reference thereto, but had acted upon the claim and rejected it, no suit could have been maintained thereon. But having called for the facts in order to decide upon the claim, which facts were furnished by the taxpayer through the commissioner's agent, we fail to see wherein the situation was any different from what it would have been if the commissioner had asked the taxpayer direct to furnish the same." (Italics are the court's.)

In view of the foregoing we respectfully submit that the respondent's claims for refund on Form 843 for 1922 and 1923, together with the evidence which the respondent filed with the Commissioner in support thereof were adequate to form the basis of this suit, and that the decision of the court below is correct and should be affirmed.

II.

If the Respondent's Claims for Refund on Form 843, Together with Evidence Which the Respondent Furnished to the Commissioner in Support Thereof, Are Inadequate to Form the Basis of This Suit, Said Claims on Form 843 Together with Said Evidence, as Amended by the Respondent on April 2, 1929, Are Adequate to Form the Basis of Such Suit.

The petitioner contends that no amendment of the original claims for refund on Form 843 was attempted by the respondent. This is not correct. After receiving the Commissioner's letter of January 26, 1929, advising that respondent's claims for refund would be rejected because no evidence had been filed with the claims to support the same, the respondent specifically amended its said claims in a letter addressed to the Commissioner under date of April 2, 1929. This letter stated in part as follows:

> "While it would not appear to be necessary to amend the original claims filed for the years 1922 and 1923, after the commissioner had audited the books of the taxpayer and found the overassessments above referred to for said years, the taxpayer, however, does hereby amend its said claims for refund for 1922 and 1923, respectively, by specifically claiming the overassessments of $1,660.70 and $4,835.76 for the years 1922 and 1923, respectively, as outlined in the commissioner's said letter of October 13, 1928, a copy of which is attached hereto and made a part hereof."

(Court of Claims finding No. 9, R. 37; also R. 32, containing copy of this amendment.)

This amendment was made after the expiration of the statutory period for filing an original claim for refund for the respective years; *but prior to the Commissioner's rejection of the original claims on Form 843,* which occurred on October 23, 1929. (R. 37.)

The court below did not consider the effect of said amendment of April 2, 1929, because the court held that such amendment was unnecessary. (R. 39.) The issue, however, was raised by the respondent in Paragraph XIX of its petition filed in the Court of Claims in this case. (R. 12.)

In *McKesson & Robbins v. Edwards,* 57 F. (2d) 147, decided by the Circuit Court of Appeals for the Second Circuit, the taxpayer filed a claim for refund merely claiming "amortization of war facilities," which was rejected on December 23, 1925. The taxpayer filed a brief in support of its said claim, setting forth the grounds in detail. This brief was filed after the expiration of the statute of limitations for filing a claim for refund and there was also some question as to whether the brief was filed on December 1, 1925, before the rejection of the claim on December 23, 1925, or on January 14, 1926, subsequent to the rejection of said claim. Irrespective of this, however, the Commissioner considered the brief, and on March 27, 1926, advised the taxpayer that its claim would be rejected.

In defense of the suit, the government contended (1) that the suit was not instituted within two

years after the rejection of the claim; and (2) that the claim was inadequate upon which to base the suit.

Whether the suit was brought within two years after the rejection of the claim depended upon whether it was finally rejected on December 23, 1925, or on or after March 27, 1926. The court held that the rejection of December 23, 1925, was not final in view of the fact that the Commissioner considered the brief subsequent thereto and advised the taxpayer on March 27, 1926, that its claim would be rejected. The court, consequently, held in favor of the taxpayer on that issue.

On the second point the court held that the claim for refund on account of "amortization of war facilities" could be amended after the expiration of the statute of limitations for filing claims if it had not been finally rejected prior to such amendment. We quote in part from the opinion as follows:

> "A final question is as to the sufficiency of the claim which stated no more as a ground for the refund than the phrase, 'amortization of war facilities.' This did not satisfy the regulations, and the claim could have been rejected for that reason without consideration of the merits. Yet it was more than a mere caveat, an effort to hold open the time for a claim in the future, like those considered in *United States v. Felt & Tarrant,* 283 U. S. 269; *Art Metal Const. Co. v. U. S.,* 47 F. (2d) 558, and *U. S. ex rel. Endicott v. Mellon,* 59 App. D. C. 255; it did state a ground, though defectively. It seems to us that in such a case the taxpayer may amend even though the amendment is filed after the period for filing has ex-

pired. We have indeed found no case to that effect except *Lehigh & Wilkes Barre Coal Co. v. U. S.*, 38 F. (2d) 637; and it appears to be settled that after rejection, amendments are too late. *Sugar Land Ry. Co. v. U. S.*, 48 F. (2d) 973; *Mutual Life, etc. Co. v. U. S.*, 49 F. (2d) 662; *Wausau, etc. Co. v. U. S.*, 49 F. (2d) 665; *Connell v. Hopkins*, 43 F. (2d) 773. But the distinction between what will bear amendment and what will not, is common throughout the law; it is no doubt one of degree, like most else, but there seems no reason not to apply it here.

"Hence, if the brief was filed on December 1, 1925, and was enough in substance, the claim was amended; it was good. This would not have been true, if it was filed on January 14, 1926, except for its acceptance by the Commissioner. The same reasoning applies here as to the point just preceding. He might have declined to take it at all and the case would have been at an end, like *Solomon v. U. S.*, 57 F. (2d) 150, which we decide herewith; he is not obliged to reconsider claims once rejected: But he received it and acted upon it, and he must be supposed to have done so in the exercise of a discretion with which he is vested. Having done so, it became an amendment, and must be taken as such in any action which reviews his conclusion. Hence we hold that the claim was sufficient, whenever the brief was filed."

In *McKesson & Robbins v. Edwards, supra,* Judge Learned Hand distinguished that case from that of *Art Metal Construction Company v. United States,* 47 F. (2d) 558, the opinion of which he also wrote. In the latter case the claim stated:

"This claim is filed pursuant to the provisions of Section 252 of Act of 1921 for the refunding of any sum which by reason of future court cases, treasury rulings, or other reasons it may appear has been illegally or erroneously assessed or collected. The purpose in submitting this claim is to protect the taxpayer's rights in respect of the time within which such claims must be filed."

No mention was made of special assessment until July 6, 1925, after the expiration of the statute for filing claims, when a brief was filed claiming special assessment. In 1927 the Commissioner decided that the taxpayer was entitled to special assessment and held that the claim for refund therefor was too late. The Court held for the government and said in part:

"The supposed claim was no claim at all; it was a mere caveat, an attempt to reserve the taxpayer's right at some later time to file a claim, should something turn up, either because of a change in the rulings of the courts, or of the Department, or for any other reason which might lead him to suppose that he could get back what he had already paid. We are not therefore dealing with a claim ineffectually couched, which advised the Commissioner that the taxpayer had come to doubt the validity of any part of the tax. In such cases we may assume arguendo that much latitude would be allowed, not only to amend as to the amount demanded, but to amplify the grounds of the claim, and perhaps to set out others. * * *

"Moreover, we cannot agree that such a claim can be pieced out by matter in pais, cer-

tainly when it is no more than a general reservation of all future claims. Whatever the purpose of the statute, it is at least to advise the Commissioner that the taxpayer intends by it to assert that a part of his tax was never due. To allow him to substitute, not a claim, but a warning that he may in the future make a claim—which is all on any theory that the supposed claim was—substantially dispenses with the statute altogether. Presumably, it was to avoid exactly such resulting uncertainties that the act and the regulations required something definite enough for action. The claim called for, and indeed admitted, no action at all. Therefore the Commissioner was not bound to return it. It bore no evidence that the plaintiff had any present complaint in mind; there was no intimation until after April 1, 1925, that anything had happened which had caused it to doubt any item of the tax which it had itself computed and paid. Patently, the claim was nothing but an effort to extend the time which the statute had given; an effort which the Commissioner was no more bound to repudiate, than if it had expressly asserted such a right, as perhaps indeed it did."

Similar purported claims were involved in *Zeller v. U. S.*, 46 F. (2d) 1023; and *U. S. ex rel. Endicott v. Mellon*, 39 F. (2d) 505, which the courts held were not claims at all, and, consequently, were not subject to amendment after the statutory period for filing claims expired.

The question of whether a timely claim for refund may be amended before rejection but after the expiration of the statute of limitations for the

filing of a claim for refund, is before this court in *U. S. v. Factors & Finance Co.,* No. 141; and *U. S. v. Henry Prentiss & Co., Inc.,* No. 234, which are set down for argument just preceding the instant case. The courts below in those cases held that a claim under such circumstances could be amended. The Court of Claims also held to the same effect in *Swift & Co. v. U. S.,* 67 Ct. Cl. 322.

The court below rightly held that "The claims for refund as originally filed by the plaintiff gave the Commissioner jurisdiction over the matter of an overpayment for the year for which the claims were filed." After filing said claims the respondent furnished to the Commissioner the necessary detailed evidence in support thereof *in order that the Commissioner might decide upon the merits thereof.* Clearly the respondent had the right to amend these claims after the expiration of the statute of limitations for the filing of claims, if such amendment were necessary, which we do not admit; but if amendment were necessary, the amendment of April 2, 1929, unquestionably perfected said claims, and such claims as amended are adequate for the purpose of this suit.

CONCLUSION

The decision of the court below is correct and should be affirmed.

Respectfully submitted,

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Investment Building,
Washington, D. C.
Counsel for Respondent.

APPENDIX

Section 284 (a) and (b) of the Revenue Act of 1926, provide:

> (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.
>
> (b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—
>
> (1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

Section 3226, Revised Statutes, as amended by Section 1318, Revenue Act of 1921, provides as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Article 1036, Treasury Regulations 62, promulgated under the Revenue Act of 1921, provides:

> ART. 1036. *Claims for refund of taxes erroneously collected.*—Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. In the case of the taxpayer's death, certified copies of the letters of administration or letters testamentary, or other similar evidence, must be annexed to the claim to show the authority of the administrator or executor.
>
> The affidavit may be made by an agent of the person assessed, but in such a case a power of attorney must accompany the claim. Checks in payment of claims allowed will be drawn in the names of the persons entitled to the money and shall, unless otherwise directed, be sent directly to the proper persons. The Commissioner has no authority to refund on equitable grounds penalties legally collected. As to claims for refund of sums recovered by suit see Article 1051.

(T. D. 4265)

Internal Revenue Taxes
Regulations Applicable to Claims for Credit and Refund

Treasury Department,
Office of Commissioner of
Internal Revenue,
Washington, D. C.

To All Collectors of Internal Revenue and Others Concerned:

(1) A claim for refund or credit of any internal-revenue tax, or for refund of interest or penalties, erroneously or illegally collected, should be made on the form prescribed by the Treasury Department (Form 843) and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

(2) No refund or credit will be allowed after the expiration of the statutory period of limitations applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim, or an amendment thereof, filed prior to the expiration of such period.

(3) These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date, and all other regulations are modified in so far as they are inconsistent with these regulations.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved March 27, 1929:
A. W. MELLON,
Secretary of the Treasury.